IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-787

TENNESSEE VALLEY AUTHORITY,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY
and RUSSELL E. TRAIN, ADMINISTRATOR,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY OF THE TENNESSEE VALLEY AUTHORITY TO THE BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Herbert S. Sanger, Jr.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

Lewis E. Wallace
Deputy General Counsel

Thomas A. Pedersen

Robert A. Washburn

Attorneys for Petitioner

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

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This reply is limited to a short discussion of two fundamental errors found in the Environmental Protection Agency's brief in opposition to the petition for a writ of certiorari: (1) EPA's contention that this case is moot totally ignores the sworn statement of the head of Kentucky's environmental protection department, and relies

instead entirely on EPA's conjectures as to what future regulatory action Kentucky may plan; and (2) the legislative history of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246, does not, as claimed, support EPA's position in this case.

(1) *The Controversy Is Not Moot.*

EPA argues that the court of appeals erred in holding that the case is not moot because

> Contrary to the court of appeals, the case cannot be considered a live controversy on the basis that the order involved is "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515. The Administrator's disapproval of Section 1(1)(b) of the Kentucky plan is not "capable of repetition" so far as Kentucky is concerned, since Kentucky has decided that it does not wish to have Section 1(1)(b) included in its implementation plan and does not wish to use alternative control strategies irrespective of whether the Administrator is required to approve them. [Brief for the Federal Respondents in Opposition, p. 7 (hereinafter "EPA's Brief").]

This statement is contrary to the record. John S. Hoffman, Secretary of the Department for Natural Resources and Environmental Protection for the Commonwealth of Kentucky, stated in his affidavit of June 9, 1975 (filed with TVA's reply brief in the court of appeals), that:

> Should that Court determine that EPA is without statutory authority to disapprove of this regulation [section 1(1)(b) of Kentucky's implementation plan], we will then

reconsider its reinstatement as a part of Kentucky's Implementation Plan.[1]

As clearly shown in Secretary Hoffman's affidavit, Kentucky will not reinstate section 1(1)(b) as long as EPA claims that it is invalid. However, the affidavit also shows that the regulation will be reconsidered by Kentucky if this Court finds that EPA has no authority to strike it down. Accordingly, this is a case in which "the issues presented here [are] 'capable of repetition, yet evading review,' so that [petitioner is] adversely affected by government 'without a chance of redress.'" *Super Tire Eng'r Co. v. McCorkle*, 416 U.S. 115, 122 (1974). Even more, EPA's action is also a continuing wrong which is currently preventing reconsideration of the disputed regulation by Kentucky.

(2) ***The Legislative History of Subsequent Amendments to the Clean Air Act Does Not Support EPA's Position.***

EPA stated in its brief that

> . . . the legislative history of subsequent amendments to the Clean Air Act shows that Congress intended that state implementation plans should require the use of continuous emission controls when available. [EPA's Brief, pp. 13-14.]

The "subsequent amendments" relied upon by EPA are the Energy Supply and Environmental Coordination Act of 1974 (hereinafter "ESECA"), Pub. L. No. 93-319, 88 Stat. 246, which was special legislation designed to solve the particular problem created by the Arab oil embargo of September 1973. Among the emergency measures which

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[1] A copy of this affidavit is attached for the Court's convenience as Appendix A.

Congress devised to reduce the Nation's dependence on foreign oil was to grant special temporary relief from air pollution control requirements to those power plants and large industrial plants which were converting from oil to coal. This provision was enacted as section 119 of the Clean Air Act, 42 U.S.C. § 1857c-10 (Supp. IV, 1974).

During the course of developing this special legislation the House adopted the so-called "Murphy amendment," which would have clarified the meaning of section 110 of the Clean Air Act by clearly permitting intermittent emission limitations as a full-fledged method for meeting the national ambient air quality standards. In its brief, EPA correctly points out that the "Murphy amendment" was subsequently deleted by the conference committee of the two Houses. It incorrectly concludes, however, that this action indicates that Congress intended to restrict the number of alternative methods available to achieve the national air quality standards only to "continuous emission controls," such as scrubbers or the full-time use of low sulfur fuel (EPA's Brief, pp. 12-16). In fact, Congress had no such intent. In discussing the "Murphy amendment," the conference committee stated:

> *The House-passed bill would have permitted the use of so-called intermittent or alternative control strategies* as a means of meeting ambient air quality standards if such strategies were determined by the Administrator to be reliable and enforceable ["Murphy amendment"]. This permission would have applied to both existing sources not affected directly by the energy emergency and sources required to convert to coal under the emergency legislation.

> The Senate bill would have permitted revision of existing implementation plans to require use of continuous emission reduction systems on any fuel-burning stationary sources affected by shortages of fuels, suspensions or conversions.
>
> *The conference agreement does not include either of the foregoing broad provisions. Instead, the conferees decided to limit the application of this provision to those sources which convert to combustion of coal as a result of the energy emergency.* [S. Conf. Rep. No. 93-663, 93d Cong., 1st Sess. 83 (1973); emphasis added.][2]

Rather than rejecting intermittent controls per se as a method to attain the national ambient air quality standards, the conference committee simply rejected both the "Murphy amendment" and the Senate proposal because they were overly broad and not relevant to the limited purpose of the special legislation being considered. EPA's contrary inferences are unwarranted.

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[2] Identical language is found in a later conference report. S. Conf. Rep. No. 93-681, 93d Cong., 2d Sess., as printed at 120 Cong. Rec. S 1532 (daily ed. Feb. 7, 1974). The actual bill considered in both of these conference reports (S. 2589) was subsequently vetoed by the President for reasons unrelated to this case. 120 Cong. Rec. S 2883-84 (daily ed. Mar. 6, 1974). Subsequently, Congress met the President's objections and enacted the Energy Supply and Environmental Coordination Act of 1974.

CONCLUSION

For the foregoing reasons, and as set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Herbert S. Sanger, Jr.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

Lewis E. Wallace
Deputy General Counsel

Thomas A. Pedersen

Robert E. Washburn

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that the foregoing brief was served on all parties required to be served by mailing three copies thereof airmail, postage prepaid, to counsel of record as follows: Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530; Charles W. Shipley, Esq., Pollution Control Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C. 20530, and Richard J. Denny, Jr., Esq., Office of General Counsel, Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20024; on the intervenor Commonwealth of Kentucky by mailing copies to Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; and on the intervenor Natural Resources Defense Council, Inc., by mailing copies to Richard E. Ayers, Esq., 1710 N Street, NW., Washington, D.C. 20036.

This 30th day of March, 1976.

Thomas A. Pedersen
Division of Law
Tennessee Valley Authority
Knoxville, Tennessee 37902

Attorney for Petitioner
Tennessee Valley Authority

APPENDIX A

AFFIDAVIT OF JOHN S. HOFFMAN

COMMONWEALTH OF KENTUCKY)
) SS
COUNTY OF FRANKLIN)

Affiant, John S. Hoffman, being first duly sworn, states as follows:

I am Secretary of the Department for Natural Resources and Environmental Protection for the Commonwealth of Kentucky. Among other duties and responsibilities, this Department has the responsibility for the adoption, administration and enforcement of rules and regulations for the control of air pollution, including the preparation, adoption and enforcement of Kentucky's Implementation Plan for the control of air pollution pursuant to the national Clean Air Act.

The official records of the Department disclose that on February 15, 1972, after a public hearing and in accordance with Section 110 of the Clean Air Act, Kentucky adopted an alternate control regulation as a part of its air pollution control regulations. This regulation, as published in the existing regulations, reads as follows:

> Where it is demonstrated to the satisfaction of the Commission that an air contaminant source can apply an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing.

This regulation was a part of Kentucky's Implementation Plan which was submitted by Governor Ford to the federal Environmental Protection

[2]

Agency for approval. EPA's approval of the Implementation Plan on May 31, 1972, was set aside by court action because of EPA's failure to comply with the procedural requirements of the law.

The plan was then resubmitted by Governor Ford to EPA for approval. On August 15, 1974, EPA's Administrator approved the plan again, except for the alternate control regulation which was disapproved as failing to meet EPA's regulations.

Under Kentucky law, all existing regulations are required to be reexamined and new regulations issued by July 1, 1975, at which time all existing regulations expire. In the proposed new regulations the alternate control provision has been deleted and will not be considered for reinstatement until EPA changes its policy or it has been judicially determined that EPA is without legal authority to disapprove of such a regulation. The question of EPA's authority to strike down this regulation is now being litigated in two actions now pending in the United States Court of Appeals for the Sixth Circuit. Should that Court determine that EPA is without statutory authority to disapprove of this regulation, we will then reconsider its reinstatement as a part of Kentucky's Implementation Plan.

/s/ John S. Hoffman
John S. Hoffman

Subscribed and sworn to before me, a Notary Public in and for the Commonwealth and County aforesaid, by John S. Hoffman, this 9th day of June, 1975.

My Commission expires June 21, 1976.

/s/ Rita G. Puckett
Notary Public